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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 800

SIDNEY L. IRWIN, et al.,
Petitioners,

vs.

BOB CLARK, doing business as OILFIELD VACUUM SERVICE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 11, 1968. The jurisdiction of the Court is invoked under 28 USC, Section 154 (1). Original jurisdiction was conferred on the United States District Court for the Eastern District of California by 28 USC, Section 1337.

QUESTION PRESENTED

The issue here is whether the Court of Appeals was in error in affirming the judgment of the trial Court holding that "waiting time" upon the respondent's premises by its employees, under the facts, was not working time and was not compensable under the Fair Labor Standards Act.

STATUTES INVOLVED

The statute involved is the Fair Labor Standards Act. The statutory provisions are at 29 U.S.C.A. 202-a, 29 U.S.C.A. 203, 29 U.S.C.A. 206, 29 U.S.C.A. 207, 29 U.S.C.A. 216-b, and 29 U.S.C.A. 260.

STATEMENT OF THE CASE

The petitioners were truck drivers employed by respondent. They were paid for all time actually worked but seek pay for waiting time at the employer's premises during periods of time in which no work was performed. The Ninth Circuit Court affirmed that the employees were "waiting to be hired" and were not "hired to wait." (The respondent admitted liability for a period of time from June 25, 1965, to July 5, 1965. This period is not in issue in the present case.)

ARGUMENT

The Circuit Court's decision is fully in accord with the decisions of this Court and of the Circuit Courts. Petitioners in their Writ do not attack the findings of the Court below as being without support in the evidence. The relevant findings of fact by the trial Court are:

> "7. Plaintiffs were paid for all hours actually worked at either the hourly wage rate or the overtime wage rate.
>
> "8. Plaintiffs were not paid for the time that they were waiting to go to work.
>
> "9. Plaintiffs were on call 24 hours per day, 7 days per week.
>
> "10. Many of plaintiffs frequently came to defendant's place of business between 7:00 a.m. and 8:00 a.m. voluntarily and without being called because most of the work came in early in the morning and the men available received the most work, although effort was made to equalize the hours amongst all the employees.
>
> "11. Except during the period as hereinafter set forth, plaintiffs were not required to report for work at any given time and were free to go and come as they pleased, as long as they left a telephone number where they could be called in the event they were needed." (R. 97, lines 14-29.)

The Court in its conclusions of law found:

> "6. That except for the period June 25, 1965, to July 5, 1965, plaintiffs were free to come and go as they pleased." (R. 100, lines 3 and 4.)
>
> "7. That except for the period June 25, 1965, to July 5, 1965, plaintiffs were not 'hired to wait',

but were 'waiting to be hired.'" (R. 100, lines 5-7.)

The petitioners before the Circuit Court and in their petition argue that an element of economic compulsion is a basis in law for finding the "waiting time" compensable. We find no support for the plaintiffs' theory either in the cases cited by petitioners, under the Act or interpretations thereof. The Circuit Court of Appeal in its decision held that "waiting time may be working time,[1] but whether so is a question of fact to be resolved by appropriate findings of the District Court in light of all the circumstances."[2] The decision of the Ninth Circuit Court is in accord with the interpretative bulletins issued by the Wage and Hour Administrator in regard to waiting time.

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[1] *Armour & Co. v. Wantock*, 323 U.S. 126 (1944).

[2] "For reasons set forth in the Armour case decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. Walling v. Jacksonville Paper Co., 317 U.S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was." *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-37.

> "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."
>
> "Idle time, waiting to resume work during the work day, may be excluded from working time. Waiting time would be considered off duty time and not part of the employee's hours of work if he is completely relieved of all duty and responsibilities and is permitted to leave the job and go where he pleases." 29 C.F.R. Ch. V, Section 785.17.

The interpretative bulletins issued by the Wage and Hour Administrator are entitled to respect.[3]

We can find no support for plaintiffs' theory of economic compulsion or economic reality in the cases cited by plaintiffs. In the *Armour & Co. v. Wantock,* supra, and *Skidmore v. Swift & Co.,* supra, the cases involved employment of firemen for plant protection where they were required to remain on the premises and in effect were hired to wait. In *Bumpus v. Continental Baking,* 124 F. 2d 547, waiting time was not even an issue. In *Walling v. Dunbar Transfer and Storage, Inc.,* 7 Labor Cases 64,599, heavily relied upon by plaintiffs, the facts are easily distinguishable. In that case, employees were required:

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[3]*Skidmore v. Swift & Co.,* 323 U.S. 134; *Dumas v. King,* 157 F.2d 463; *Gordon v. Paducah Ice Mfg. Co.,* 41 F.Supp. 980.

> "to get their trucks from the garage, check the gas and tires, drive to the railway terminal, and wait for a loading space, a freight car to be unloaded, or a checker to be available before they could begin loading their trucks. They received no credit or compensation for time so spent, being credited only with time spent after they started loading."

In that case, it is obvious that the employees were engaged in performing services for their employer for which they did not receive compensation. Petitioners cite *Westover v. Stockholders' Publishing Co.*, 237 F. 2d 948, which states if employees are terminated, it is plain from a standpoint of economic reality that the employees have lost their source of income and were in plain language "out of a job." The issue in that case involved pay for work performed and had no relationship whatsoever to waiting time.

The judgment of the Ninth Circuit Court of Appeal in affirming the decision of the District Court holding that waiting time under the facts of this case was not compensable under the Fair Labor Standards Act is not in conflict with any of the decisions of this Court nor are there any conflicting decisions in the Circuit Courts.

We can find no legal support for plaintiffs' theory of economic compulsion or economic reality as a matter of law. Such theory under appropriate facts could be evidenced for the trier of fact to weigh in determining whether "waiting time" was actually working time.

The trial Court considered the application of the principle to the evidence of the case and denied plaintiffs' "Motion For New Trial Or For An Altered Verdict Pursuant To F.R.C.P. Rule 59 (a)."[4]

CONCLUSION

Special and important reasons do not exist for granting a writ of certiorari in this case, and the petition should be denied.

Dated, Fresno, California,
December 12, 1968.

Respectfully submitted,
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[4]R. 109, lines 25-28. "3. Specifically the Court has erred in construing 'voluntary presence on the job' to include presence on the job when it results from the economic coercion of not obtaining work when not present."